# RENT AS A PRIORITY CLAIM IN BANKRUPTCY IN VIRGINIA.

THE right of the landlord in this state to priority of payment out of the goods of the tenant upon the leased premises for all rent owing by the tenant, not in excess of one year, has long been regarded, by the profession and the laity alike, as one so fixed and unquestioned as to be free from doubt. It is submitted, however, that in some circumstances, for instance, where the tenant becomes bankrupt, the landlord's right to priority is not altogether free from question.

The purpose of this paper is to call attention to some of the decisions upon this point, in the hope that their consideration, in the light of the suggestions herein contained, may prove helpful to the profession in dealing with a question which frequently arises in bankruptcy practice. That question may be stated thus:

> Has a landlord in Virginia to whom rent is owing by a bankrupt tenant, either by distress sued out within four months prior to the bankruptcy, or in the absence of such distress, any lien upon the tenant's property on the premises, or any right to priority of payment out of the proceeds from the sale of such property by the bankruptcy court?

The substantive rights of the landlord in Virginia are fixed by statute and the ultimate decision of the question presented depends upon the interpretation and construction of these statutes by our Supreme Court of Appeals, as such decision will be controlling upon our inferior state courts and the federal courts.

This court has not had occasion to deal with the specific question thus far, but a consideration of the pertinent decisions from other states and other federal districts will aid the local practitioner to forecast more accurately its decision when it is called upon to render one upon the point involved. For while these decisions have been based upon local statutes whose terms are more or less variant, they have in some instances discussed

the statutory phraseology in a way that suggests the significance of the respective terms used.

At common law the landlord had no *lien* for rent upon the tenant's goods, although when found upon the leased premises they were subject to distress. The levy was made by the landlord himself (which practice is still followed in a number of the states); but the property seized under the distress was held by him merely as a pledge or security without the right in him actually to subject it to the debt due. And while the exercise of the right of distress resulted in securing a priority over other debts, this right did not itself constitute a *lien* in a strict technical sense. This was practically decided in Virginia so long ago as (1846), in the case of Geiger *v.* Harman,[1] upon which comment will hereinafter be made.

The remedy by distress and the method of subjecting the goods and chattels seized thereunder have been changed by statute in this state; but it is doubtful, in the writer's opinion, if the landlord's common law rights have been *enlarged,* except as provided in § 2792 of the Code. And no lien, strictly speaking, upon the goods and chattels of the tenant, is given to the landlord by *the specific terms* of our statutes. Indeed Mr. Burks, in his work on Pleading and Practice, states without restriction, that no *lien* is created in favor of the landlord by our statute.[2]

The pertinent provisions of our Code are contained in §§ 2790, 2791 and 2792, as follows:

> § 2790. Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by the constable, sheriff, or sergeant of the county or corporation wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice or clerk of the circuit or corporation court, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed.

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[1] 3 Gratt. 130.

[2] Burks, Pleading and Practice, p. 14.

§ 2791. The distress may be levied on any goods of the lessee, or his assignee, or under-tenant, found on the premises, or which may have been removed therefrom not more than thirty days. If the goods of such lessee, assignee, or under-tenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, they shall be liable to distress, but for not more than one year's rent, whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section.

§ 2792. If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage or otherwise upon the interest or property in goods on premises leased or rented, of any such person liable for the rent, the party having such lien may remove said goods from the premises on the following terms, and not otherwise, that is to say: on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being altogether more than a year's rent in any case. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

The pertinent sections of the Bankruptcy Act are as follows:

§ 64 (b) 5. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estate, and the order of payment shall be * * *

Debts owing to any person who by the laws of the State or the United States is entitled to priority.

§ 67d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded in accordance with law, if record thereof is necessary, in order to impart notice,

shall, to the extent of such present consideration only, not be affected by this Act.

§ 67f. That all levies, judgments, attachments, or other liens obtained through legal proceeding against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same.

The question under consideration has arisen most frequently in bankruptcy cases in federal courts, and decisions by these courts have applied the statute laws of Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Pennsylvania, Texas, Virginia and West Virginia. As these respective statutes contain different provisions, and as the decisions sometimes turn upon whether the right of distress had been actually exercised prior to bankruptcy proceedings, it is not surprising that the decisions have not been altogether uniform. Indeed they are not always in accord even when, as in Georgia, the United States District Courts in the different districts have applied the identical statute.

The Kentucky statute provides that the landlord "shall have a *superior lien* on personal property of the tenant." In the case of In re Jefferson,[3] the court denied the right of the landlord to priority of payment for rent *to become due;* and held that the quoted provision was inapplicable for, the court said:

> "It is a state regulation in cases in which no discharge from his contract obligation can be given by law to the tenant. The Bankruptcy Act can alone do that and it has made no provision similar to that of the state statute."

But in the more recent case of Courtney *v.* Fidelity Trust Company,[4] the U. S. Circuit Court of Appeals for the Sixth Circuit, dealing with the same statute, held that the landlord not only had *a lien for past due rent,* but also for *rent to become due;*

[3] 93 Fed. 948, 952.

[4] 134 C. C. A. 595, 219 Fed. 57.

that this lien was protected by the Bankruptcy Act; and that he was entitled to priority of payment. The court said:

> "At the time the present bankruptcy law was enacted, it had been settled by the same court (Kentucky) that the *lien* was enforceable in the courts of Kentucky having jurisdiction of insolvency proceedings under the state laws, and also that no steps need be taken to perfect the lien. * * * It would seem to follow that § 67d standing alone, is broad enough fairly to embrace a *statutory lien* like the one under consideration." [5]

The statute law of Pennsylvania is quite similar to that of Kentucky and has been considered in numerous cases decided by the federal courts. The earliest case is that of Longstreth *v.* Pennock,[6] in which the court, in a twenty-two line opinion, held that the landlord's *lien* was given him by the statute; that it was a matter of local law; that the statute covered the case fully; and that the landlord was entitled to priority.

In a later case where the landlord had distrained for rent prior to the institution of the bankruptcy proceedings, the U. S. District Court held that the language of the statute—"the goods and chattels being in or upon any lands * * * shall be liable for the payment of any sums of money due for rent"—created a *lien* upon the property.[7]

But where the distress was levied *after* bankruptcy proceedings had been instituted, more than a year's rent being then due and the statute providing priority for only one year's rent, it was held that the statutory priority was preserved to the landlord, but his right to levy distress and enforce his lien, if *he had it,* had been lost after the goods had become *in custodia legis.*[8]

In the still later case of In re Pittsburg Drug Company,[9] the court held that the landlord was entitled to priority, whether he had sued out distress or not, stating its conclusion succinctly as follows:

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[5] 134 C. C. A. 595, 219 Fed. 57, 61.
[6] 20 Wall. 575.
[7] In re Hoover, 113 Fed. 136.
[8] In re Duble, 117 Fed. 794.
[9] 164 Fed. 482, 486.

"The landlord has the right of distress. The goods were subject to distress. If the goods were on the premises and liable to distress the landlord would be entitled to his claim though the goods had not been taken by warrant of distress."

It should be noted that in Pennsylvania distress has been held to be a ministerial, and not a judicial act, the landlord himself making the levy. In the case of In re West Side Paper Company,[10] decided by the U. S. Circuit Court of Appeals of the Third Circuit, the court, after commenting on this fact, affirmed the right of the landlord to priority, saying:

"It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. No suit or proceeding at law, whether *in personam* or *in rem*, in the proper sense of those words, is necessary for the assertion of the right."

In this case the landlord had exercised his right of distress before the filing of the petition in bankruptcy; and the court quoted at length from the opinion of Mr. Justice Bradley in Austin *v.* O'Reilly,[11] reversing the District Court for the Southern District of Mississippi which had held that under the Mississippi statute a landlord had no lien until he had actually seized the property under distress, as follows:

"In some states, it is provided that, instead of making the distress himself, the landlord must procure a warrant from a magistrate or court, to be executed by an officer. But this regulation of the mode of exercising his right does not affect the nature of the right itself.

"It is common to call the right a lien, and yet it is not strictly such; for it does not attach to any specific article of property. The tenant, if a farmer, may, in due course of business, sell produce or cattle or other things and if a merchant, he may in the same manner sell merchandise; and the sales, if made in good faith, will be valid, and the property sold will be free from the landlord's right of distress, if removed from the demised premises, and, in most states, without such removal. But if the sale be made for the purpose of depriving the landlord of his right, he may, by

[10] 89 C. C. A. 110, 162 Fed. 110, 111.

[11] 2 Woods 670, Fed. Cas. No. 665.

> the English statutes and by the statutes of most states, follow the property within a reasonable time after its removal. Now, if the landlord's rights were a strict lien, no valid sales could be made at all. Still, being commonly called a lien, and being a peculiar right in the nature of a lien, which is greatly relied on as an essential condition of all leases, and the subversion of which would work great injustice, and would in the end operate prejudicially to the interests both of the tenants and their creditors, by inducing landlords to require onerous conditions for their security, the Supreme Court of the United States and most of the district and circuit courts, have regarded it as fairly to be classed as a lien within the true intent and meaning of the bankrupt act, and have allowed the landlord a priority over the general creditors to the extent of the goods subject to his right of distress. This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent, or a reasonable amount (generally a year's rent), which may have accrued." [12]

In Delaware the landlord's claim to priority has been also upheld. In In re Mitchell,[13] it seems to have been taken for granted that under the statutes of Delaware the landlord had a lien; and in the opinion of the court considerable reliance seems to have been placed upon the decision by Chase, C. J., in the case of In re Wynne,[14] construing the Virginia statutes. The pertinent provisions of the Delaware statutes are not set forth in the court's opinion, but as stated above, it seems to have been taken for granted that they expressly gave the landlord a lien.

In Georgia the statute provides that:

> "Landlords shall have a *special lien* for rent on crops * * * and a *general lien* on the property of the debtor liable to levy and sale; and such general lien shall date from the time of the levy of a distress warrant to enforce the same."

The statute has been applied by the United States Supreme Court in Mayer *v.* Henderson.[15] In that case the landlord had

[12] 89 C. C. A. 110, 162 Fed. 110, 113.
[13] 116 Fed. 87.
[14] Chase, 227, Fed. Cas. No. 18,117.
[15] 225 U. S. 631.

levied his distress warrant three days before the petition in bankruptcy was filed against the tenant, and the court sustained his claim to priority. The court said:

> " 'The statutory restrictions as to date, rank and priority may be important in a controversy with other lien holders, but was wholly immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. As against them the landlord had, from the beginning of the tenancy, the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the lien of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the nature of the claim and the relation between himself as landlord and Burns as tenant. In issuing the distress warrant the justice acted ministerially.' And, moreover, the court said: 'The Code, (Sec. 2787) expressly establishes liens in favor of landlords.' It (Sec. 3124) gives them 'power to distrain for rent as soon as the same is due.' It declares (Sec. 2795) that landlords shall have 'a general lien on the property of the tenant, liable to levy and sale which dates from the levy of the distress warrant to enforce the same.' 'It is true that prior to levy it covers no special property, and attaches only to what is seized under the distress warrant issued to *enforce* the lien given by statute.' " [16]

And in the case of In re Burns [17] and In re V. D. L. Company,[18] the landlord's claim to priority was sustained. But these cases, as well as Mayer *v.* Henderson, were decided prior to the Amendment of § 47a (2) of the Bankruptcy Act in 1910, which gives to the trustee the rights of a creditor *armed with process.*

Since that amendment, and in cases where the landlord had not actually sued out a distress warrant, the decisions of the federal courts in the Districts of Georgia are not in accord.

Judge Speer, in the Southern District, has held that, notwithstanding the amendment and in the absence of actual distress proceedings, the landlord is entitled to priority. In his opinion the purpose of the amendment is "to protect the general cred-

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[16] 225 U. S. 631, 638.
[17] 175 Fed. 633.
[18] 175 Fed. 635.

itors from unrecorded mortgages, unlawful transfers, spurious claims and to prevent the dissipation of the bankruptcy assets through unworthy and unmeritorious demands;" and the trustee takes the lien given him by the Bankruptcy Act with knowledge of the contractual relations between the landlord and tenant.[19]

In the Northern District of Georgia, in the case of In re Grovenstein-Bishop Company,[20] Judge Newman reached a contrary conclusion, the facts being practically identical with those considered by Judge Speer. He quotes from Henderson *v.* Mayer to sustain his position and concludes that, as the local law only gives the landlord a lien from the time of the levy, and as no distress was actually levied, the trustee under the amended Bankruptcy Act acquired a "general judgment lien which necessarily has priority over a landlord's general claim for debt." In the course of the opinion he says:

> "There is a lien existing all along without reference to the issuance or levy of distress warrant, in favor of the landlord, which must be superior to *general creditor;* but it is not superior to judgments obtained against the property of the bankrupt and that is what the trustee has under this amendment of June, 1910." [21]

In Texas the statute provides that:

> "All persons leasing * * * shall have a *preference lien* upon all the property of the tenant."

This statute was construed in Martin *v.* Orgain,[22] a case frequently cited by the courts in discussing this subject, and the claim of the landlord to the lien and the resulting priority was sustained.

The law of Iowa also provides in terms that the landlord shall have a lien for his rent. In the two cases in which this statute has been applied by the federal courts the claimed priority was allowed.[23]

In Louisiana the statutory provision that the lessor has for

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[19] In re City Drug Store, 224 Fed. 132.

[20] 223 Fed. 878.

[21] 223 Fed. 878, 880.

[22] 174 Fed. 772.

[23] In re Byrne, 97 Fed. 763; Des Moines Bank *v.* Council Bluffs Bank, 150 Fed. 301.

the payment of his rent *"a right of pledge"* on the movable effects of the lessee found on the leased property, has been construed to sustain the landlord's claim to a lien and to priority of payment.[24]

In Illinois, where the statutory provision is similar to that of Virginia, the courts have quite generally decided that the landlord has no specific lien upon the tenant's property and is not entitled to priority of payment out of the proceeds of their sale in bankruptcy proceedings.

It is true that in Wilson *v.* Brock,[25] the U. S. Circuit Court of Appeals held that the landlord had such a lien and was entitled to priority; but in that case the lease itself in terms contracted for a lien in favor of the landlord, and he had levied a distress upon the tenant's property two days prior to the institution of the bankruptcy proceedings. The court said:

> "Under the lease and the Illinois decisions interpreting the lease and the rights of the parties thereunder (Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414), the right of lien was created when the lease was executed, and the tenant entered upon possession of the premises * * * it was the kind of lien, it seems to us, that § 67d was intended to preserve, for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them the levy of the distress warrant was authorized." [26]

But in Morgan *v.* Campbell,[27] a case in which no lien was specifically provided for in the lease itself and in which no steps had been taken by the landlord prior to the bankruptcy proceedings, it was held that the Illinois statute gave no lien upon the tenant's property in favor of the landlord, and priority was denied. Mr. Justice Davis, delivering the opinion of the court, said:

> "A statutory lien implies security upon the thing before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and the levy and sale of the property are only means of enforcing it. In other words,

[24] McFarland Co. *v.* Solanes, 108 Fed. 532.
[25] 83 C. C. A. 121, 154 Fed. 343.
[26] 83 C. C. A. 121, 154 Fed. 343, 345.
[27] 22 Wall. 381.

> if the lien is given by statute, proceedings are not necessary to fix the status of the property. But in the absence of this statutory lien, it is necessary to take proceedings to acquire a lien on the property of the tenant for the benefit of the landlord. This the landlord is enabled to do in a summary way to satisfy the rent which is due him, and in this he has an advantage as creditor over creditors at large of the tenant. It is difficult to see why the tenant, subject to this dormant right of the landlord, is not as much the owner of his effects as any other person would be who owned property and owed debts." [28]

And in the recent case of In re United Motor Chicago Company,[29] another case in which the court dealt with the claim exclusively upon the relation of landlord and tenant as governed by the statutes of Illinois, the U. S. Circuit Court of Appeals, Seventh Circuit, refused to allow priority to the landlord's claim for rent, basing its decision upon the construction placed upon the statute by the Supreme Court of Illinois to the effect that it gave no lien to the landlord.

In re Floyd-Scott Company [30] arose under the Rhode Island statute. But in that case, as in Robinson *v.* Smith,[31] the lease itself provided for a lien, and the court sustained the priority claimed by the landlord.

In Maryland the statutory provision is similar to our Section 2792. In the three cases which have applied that law, in none of which had distress been actually sued out, the landlord's claim of lien was denied. In re Potee Brick Company,[32] the court said:

> "A landlord may within four months before the filing of the petition in bankruptcy levy his distress and he may thereby acquire a lien which the subsequent adjudication does not render void; but that is because the lien he thereby secured under the law of Maryland was not a lien by legal proceedings within the meaning of § 67c of the Act."

In the case of In re Chaudron & Peyton,[33] the court, quoting from Buckley *v.* Stouffer,[34] said:

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[28] 22 Wall. 381, 390.
[29] 136 C. C. A. 378, 220 Fed. 772.
[30] 224 Fed. 987.
[31] *Supra.*
[32] 179 Fed. 525, 530.
[33] 180 Fed. 841, 844. See also In re Southern Co., 180 Fed. 838.
[34] 10 Md. 149, 69 Am. Dec. 129.

"That a claim for rent is of peculiar character and may be recovered in full, when other creditors of the tenant will be allowed a dividend only of his estate, cannot be denied. But we do not understand this to be in consequence of the rent being, per se, a lien on goods found on the premises. It is because the law allows the landlord to collect his rent by seizing the property as a pledge, to be dealt with according to its requirements * * * The legislation upon the subject indicates that rent was never considered as possessing the attributes of a lien. If so, why was it declared by the statute of Anne that sheriffs, levying executions, should satisfy one year's rent? If rent was a lien before the statute, the property passed to the sheriff, incumbered with the landlord's claim; and the plaintiff in the execution could have had satisfaction only after payment of the rent. * * * We do not think that this view of the subject deprives the landlord of any peculiar right. The law has granted him a remedy enjoyed by no other class of creditors. If he fails, when entitled, to avail himself of it, he has no more reason to complain, if loss results, than has a judgment creditor who neglects to sue out his fi. fa. and have it laid before his debtor becomes an insolvent petitioner."

The Code of West Virginia contains a provision identical with § 2792 of the Virginia Code. In Anderson *v.* Henry,[35] a case of contest for priority between a trustee in a deed of assignment and the landlord's claim was sustained. The local statute in terms preserved the landlord's rights against such a trustee and it would seem to have been sufficient for the proper decision of the case. But the court after discussing other provisions of the local law held that the landlord *had a lien.*

In the writer's opinion this part of the opinion was *obiter,* as not being essential to the decision of the case. And it has led to another obiter decision upon the same point, for In re McIntire,[36] followed it in declaring the landlord had a statutory lien in West Virginia, when the question of lien was not involved, the contest being between a deed of trust creditor and the landlord, a matter specifically controlled by the statute preserving the landlord's rights, not as a strict lien, but specifically against such deeds of trust.

[35] 45 W. Va. 317, 31 S. E. 998. [36] 142 Fed. 593.

These two cases, therefore, are of less weight as authorities than they would, upon a cursory examination, appear.

The appellate court of this state has never dealt with the specific question involved here, though it has on several occasions decided cases involving facts similar to those in Anderson *v.* Henry.[37] The court has invariably upheld the landlord's right to priority, under the clear and express provisions of § 2792, but it has in no case held that the landlord had, strictly speaking, a *lien*.[38]

It is true that in Geiger *v.* Harman,[39] a case where the tenant's goods had been removed from the leased premises less than thirty days, had been levied upon by an execution creditor and subsequently seized by the landlord in distress proceedings, the court referred in its opinion to *"the landlord's lien for a year's rent;"* but it held that the lien did not extend to protect the goods "from being taken by virtue of any execution, except in cases where the said goods and chattels be in, or upon, the demised premises." And it is doubtful if the court intended to use the word *lien* in its strictly technical sense. For if the landlord had a *lien* upon the goods on the leased premises, without taking any steps to subject them, there would seem to have been no occasion for the enactment of § 2792 to further protect him. His lien would have been ample.

In the case of In re Wynne,[40] arising under the Bankruptcy Act of 1867 and decided on circuit by Chief Justice Chase, it is even more specifically held that the landlord has a *lien* for his rent under the Virginia statute. In that case the Chief Justice said:

> "The real question is, were the goods on the premises demised to the bankrupt subject to a lien for rent under the state law when the petition was filed, independently of any proceeding by distress or attachment? Liens are various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in prin-

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[37] *Supra.*

[38] City of Richmond *v.* Duesberry, 27 Gratt. 210; Wade *v.* Figgatt, 75 Va. 575.

[39] 3 Gratt. 130.

[40] Chase, 227, Fed. Cas. No. 18,117.

ciple and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 128, of the Revised Code of Virginia, adopted in 1860. It expressly prohibits any person having, by deed of trust, mortgage, or otherwise, a lien upon goods of a tenant on demised premises from removing such goods without paying to the landlord the rent due, and securing the rent becoming due, not exceeding one year's rent, and it further requires any officer who may take such goods under legal process to pay out of the process the rent in arrear, and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due.

"We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation; it is upon the statute books, and the lien it creates must be respected and enforced." [41]

But since this case arose upon the respective claims to priority of the landlord, a trustee in bankruptcy and a trustee in a deed of trust; and since the trustee in bankruptcy clearly had no claim to the property involved; it should have been, and was, disposed of under title 41 chap. 128, § 12, Code of 1860 (the present § 2792). The question of the *lien* in its strict sense was not necessarily involved and the decision on that point was *obiter*. And although the great name of Chief Justice Chase is attached to the opinion, which has been frequently cited in subsequent cases bearing on the question, it is respectfully submitted that it is not of controlling authority, however persuasive it may be regarded.

Two cases have been recently decided by the federal courts in Virginia, in both of which the question under discussion was presented. In re Dearing Furniture Company (unreported), decided by Judge McDowell in the Western District of Virginia, was a case of contest between a landlord, claiming priority of payment for rent, on the one side, and attorneys for the bankrupt and creditors, claiming allowances, on the other. The

[41] *Ibid.*

court held that the landlord had a lien under Virginia law within the meaning of the Bankruptcy Act, and while conceding that there are authorities to the contrary, states that "the weight of authority and reason is with the landlord."

And Judge Waddill, in the Eastern District, reached the same conclusion in In re Ranch et al.[42] And he held that the issuance of process in distress was not necessary to protect the landlord's right to priority, as "the court takes judicial notice of the *lien* given by the *state statute.*"

It will appear from the brief review of the decisions herein that the greater number of courts have upheld the landlord's claim to priority. But in several of the jurisdictions the decisions have been based upon statutes which in terms give a specific lien to the landlord. In some of the cases the decision has turned upon the fact that the landlord had taken steps to subject the tenant's property prior to the bankruptcy proceedings. And, too, the great majority of the decisions were handed down prior to the amendment of § 47a (2) of the Bankruptcy Act by the Act of June, 1910. Prior to this amendment the trustee in bankruptcy took only such title as the bankrupt himself had, and the assets came into the possession of the bankruptcy court subject to the respective rights of the creditor and bankrupt debtor. Today, however, under the amendment, the trustee's title is that of a creditor "armed with process." This distinction is significant. And while the federal courts in both the Virginia districts have decided the question in favor of the landlord's priority by virtue of a statutory lien, it is for the Supreme Court of Appeals to finally determine the question.

It is stated by Mr. Burks in his work on Pleading and Practice that in Virginia the mere relation of landlord and tenant creates no *lien* for the benefit of the landlord. It is equally true that the trustee in bankruptcy *has a lien,* under the amendment of 1910, upon the property of the bankrupt. The case of In re Grovenstein-Bishop Company,[43] is interesting as foreshadowing what other courts might think of the effect of the amend-

[42] 226 Fed. 982. [43] *Supra*

ment, even in states whose statutes specifically provide, or have been construed to mean, that the landlord shall have a lien.

It is believed that the best advice a practitioner can give to a landlord client is to suggest that a distress warrant be sued out by him immediately upon default in payment of rent by a tenant whose solvency is at all a matter of doubt. The landlord's rights would not then be subject to the differentiation of the cases denying the claim of priority because no steps had been taken to perfect the claims as a lien; and the right to priority could be more clearly sustained. But even with such precaution, it is submitted that the question is not entirely free from academic doubt, for, although the federal courts of Virginia have held that the landlord has a lien under the statute, it does not appear that the effect of the amendment of June, 1910, to § 47a (2) of the Bankruptcy Act was called to the court's attention in the light of In re Grovenstein-Bishop Company; nor does it follow necessarily that the Supreme Court of Appeals, the final arbiter, will reach the same conclusion as the federal courts in Virginia have done.

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